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December 8, 2004

## **VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

CTC Communications Corp. ("CTC") submits this letter to oppose application of EEL eligibility criteria to stand-alone UNE loops. As stated in a joint letter filed by CTC and other CLECs on this subject,<sup>1</sup> application of EEL eligibility criteria to stand-alone loops would be unlawful, unnecessary, and harmful to facilities-based competition. Assuming that the Commission believes that some restrictions are appropriate to prevent use of stand-alone loops for exclusive provision of interexchange voice service, the Commission should not extend this exclusion to data services. CTC uses stand-alone loops for voice and data, local and long-distance service, but is particularly concerned about the proposed restriction because a significant portion of the service that CTC provides through the use of unbundled loops is data service.

### **Use Restrictions on UNE Loops Would Hinder Facilities-Based Competition**

Extending application of EEL criteria to stand-alone UNE loops would seriously undermine facilities-based competition provided by CTC and other CLECs and jeopardize the substantial investment made by CTC and other CLECs in reliance on FCC rules that permitted CLECs to use unbundled loops to provide data service. The Commission established the EEL criteria to encourage facilities-based competition while preventing carriers that do not use an EEL to provide local service from using that EEL to bypass LEC-imposed charges associated

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<sup>1</sup> CTC joined in an earlier *ex parte* letter on this subject. See letter of Andrew D. Lipman, Russell M. Blau, Patrick J. Donovan and Joshua M. Bobeck on behalf of Alpheus Communications, LP, ATX Communications, Inc., Covad Communications, CTC Communications Corp., Focal Communications Corporation, Freedom Ring Communications, LLC, d/b/a Bay Ring, GlobalCom, Inc., Mpower Communications Corp., Ntelos, Inc., OneEighty Communications, Inc., RCN Telecom Services, Inc., and TDS Metrocom, LLC, November 18, 2004 ("CTC November 18 letter"). This letter supplements the CTC November 18 letter.

with accessing the PSTN for purposes providing long distance service.<sup>2</sup> The Commission subsequently explained in its *Triennial Review Order* (“TRO”) that “[b]y gaming our eligibility criteria, we mean the case of a provider of exclusively non-qualifying service obtaining UNE access in order to obtain favorable rates or to otherwise engage in regulatory arbitrage.”<sup>3</sup> Except in instances of non-impairment, the Commission is precluded from imposing restrictions on access to UNEs used to provide any telecommunications service. This includes data services.

Because EEL criteria require that circuits carry voice traffic, if they were applied to stand-alone loops, CTC and other CLECs would be precluded from ordering loops to provide purely data service. For example, application of the EEL criteria to UNE loops would prevent CTC and other CLECs from using UNE loops for purposes of providing services comparable to and in competition with Verizon’s Superpath services.<sup>4</sup> These Verizon service offerings are intraexchange data service. The competition provided by CTC’s service that is comparable to Verizon’s Superpath service would be blocked by the application of EEL criteria to unbundled DS-1 loops, but is precisely the type of competition that the Commission and the Act seek to encourage.

Therefore, extending the application of EEL criteria to stand-alone loops would undermine competitive service providers’ ability to offer services, preclude innovation in advanced services, and otherwise impede the Commission’s goal of encouraging facilities-based telecommunications competition. The proposed application of EEL criteria to unbundled loops would limit deployment of facilities providing innovative broadband services by effectively precluding competitive carriers from using UNE loops to provide data service, including local data service.

Applying EEL criteria to stand-alone loops would also conflict with the Commission’s policy objective of encouraging innovation and the development of new technologies. To apply EEL criteria to stand-alone loops would discourage the development and deployment of new technologies as envisioned by the Act.

CTC cannot overstate the devastating effect on its operations of applying EEL criteria to stand alone loops. Data services are a very significant portion of CTC’s revenues and operations. CTC has devoted very significant resources to provision of data services. CTC is collocated in 58 ILEC central offices, has deployed two New Cross soft switches, 23 BPX and 56 MGX switches, and 16 Internet routers in its network. It has also made a substantial investment in over 3,400 fiber miles that make up its network backbone. If for no other reason, the Commission should not apply EEL criteria to stand-alone loops because of the harmful impact on the growth and provision of data services that would result.

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<sup>2</sup> See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9597 ¶ 18 (2000); see also *Competitive Telecommunications Assoc. v. FCC*, 309 F.3d 8, 14 (D.C. Cir 2002).

<sup>3</sup> TRO, ¶ 591.

<sup>4</sup> E.g., Verizon DTE MA Tariff No. 10, Part C, Section 2.

### **Application of EEL Eligibility Criteria to Stand-Alone UNE Loops Would Be Unlawful**

Under *USTA II* and the Act, the Commission may limit unbundled access to network elements only to the extent that the requesting carriers would be unimpaired without unbundled access to the network element.<sup>5</sup> In addition, Section 251(c)(3) of the Act prescribes that unbundled network elements shall be made available for purposes of provisioning *any* telecommunications service. The Commission therefore may not adopt restrictions that preclude use of UNEs for the provisioning of a telecommunications service, except where non-impairment is determined to exist.

The record in these dockets clearly shows that carriers offering local exchange access or data services are impaired without access to stand-alone loops.<sup>6</sup> CLECs use the same physical facilities, including loops, to provide local and long distance voice and non-voice (data) services. In particular, CLECs face significant economic barriers to duplicating those loops, whether used for voice service, data service, or both. Therefore, CLECs are clearly impaired without access to UNE loops for purposes of providing data, including local data, services.

The EEL criteria would, however, preclude use of stand-alone loops for data services because the criteria are designed to assure that EELs are used to provide voice services. Assuming that certain IXCs may have unlawfully relied on EELS or UNEs as a means of circumventing charges associated with PSTN access in provisioning interexchange service, imposing a restriction for the unique combination of loop and transport facilities that constitute an EEL is valid. However, there is no basis to extend such a restriction to a stand-alone UNE loop. The Commission recognized in 47 C.F.R. § 51.309(a) that use restrictions are inappropriate. Moreover, it recognized in 47 C.F.R. § 51.503(c) that UNE rates should not depend on the type of service provided over the UNE.

In light of these principles, the Commission should be very cautious about permitting UNEs to be used for one type of telecommunications service (voice), but not for another type of telecommunications service (data). When applied to stand-alone loops, the EEL criteria are grossly overbroad and would have the effect of precluding access to UNEs for provision of services for which CLECs would be impaired, namely for local and other data services. Therefore, the Commission may not lawfully apply these criteria to stand-alone loops. The implementation of such a step would truly be a case of the Commission throwing out the baby with the bathwater.

Moreover, an order imposing the EEL criteria on stand-alone loops would be procedurally deficient. The Notice of Proposed Rulemaking in this proceeding did not specifically raise this issue.<sup>7</sup> Consequently, the record in this proceeding lacks any significant

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<sup>5</sup> See *USTA v. FCC*, 359 F.3d 554, 591-592 (D.C. Cir. 2004) (“*USTA II*”)

<sup>6</sup> See, e.g., TRO, ¶¶ 197-202, 237-240.

<sup>7</sup> See *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988) (clarifying that the Commission must provide proper notice of a proposed rulemaking that is “adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process”); *MCI Telecommunications v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995) (vacating and remanding FCC rules due to inadequate notice under the Administrative Procedure

discussion or debate concerning a need to apply EEL criteria to stand-alone UNE loops. Although there have been some requests that the Commission undertake this action, none of the requesters have provided any significant discussion on the issue nor have any provided a sufficient explanation as how the Commission could lawfully adopt such a step without also unquestionably increasing the likelihood of court review.<sup>8</sup> Because there is no record to support applying EEL criteria to stand-alone loops, or any other evidence showing a need to apply restrictions to use of stand-alone loops, it would be arbitrary and capricious for the Commission to apply EEL criteria to stand-alone loops. The lack of record support and notice on this issue would violate the Administrative Procedures Act.

### **Application of EEL Criteria to Stand-Alone Loops Is Unnecessary**

Apart from the fact that application of EEL criteria to stand-alone loops would unlawfully preclude CLEC access to network elements for which they would be impaired, it would also be arbitrary and capricious for the Commission to take this step because it is totally unnecessary. In the *Triennial Review Order*, the Commission specifically noted that “the record does not indicate concern over misuse of voice-grade UNE loops, high-capacity loops, or other UNEs.”<sup>9</sup> The Commission also noted:

[A]lthough a requesting carrier must provide qualifying services to obtain access to loops, lower-capacity EELs and other UNEs and UNE combinations, we need not provide more detailed rules for application of these requirements to other elements at this time, given the lack of controversy and the greater administrative burdens that enforcing such protections places on requesting carriers, incumbent LECs, and the Commission.<sup>10</sup>

The Commission also cited a Covad *Ex Parte* letter noting that instituting “a regime of use restrictions on stand-alone UNE loops, which affects all facilities-based carriers, to avoid speculative concerns about access charge bypass by a few carriers would be a vastly over-inclusive solution in search of a very narrow, speculative problem.”<sup>11</sup> Nothing has changed since the *Triennial Review Order* to warrant the drastic and plainly harmful step of applying EEL criteria to stand-alone UNE loops.

Nor is there any record evidence suggesting that IXC's could or would use UNE loops (as opposed to EELs) to avoid ILEC special access. CTC and other CLECs that use stand-alone

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Act as clarified by *Florida Power*); *Sprint v. FCC*, 315 F.3d 369, 374 (D.C. Cir. Jan 21, 2003) (stating that the Commission must use the notice-and-comment procedures set forth in the Administrative Procedure Act before making “substantive changes in prior regulations.”).

<sup>8</sup> See Verizon Comments at 78-79; SBC Comments 97-98. See also *TRO*, ¶¶ 590-611; 47 C.F.R. § 51.318

<sup>9</sup> *TRO*, ¶ 592.

<sup>10</sup> See *id.*

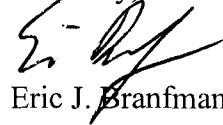
<sup>11</sup> *TRO*, n.1824 (citing Covad Jan. 21, 2003 *Ex Parte* Letter at 3).

UNE loops typically access those UNE loops in the end offices serving the customer loop locations. Only a small fraction of ILEC wire centers are access tandems. For example, in the so-called "Verizon East" states, there are several states in which only one or two access tandems serve the entire state. Accordingly, stand-alone loops in the vast majority of wire centers could not serve as a vehicle for an IXC to provide interexchange service in that wire center. Rather, generally, only the largest IXCs have traffic volumes that warrant end office trunking.

#### **A Carve-Out for Data Services Is Necessary**

In light of the harmful impact on the provisioning of data services, if the Commission applies EEL criteria to UNE loops, it should establish a carve-out that will exclude application of EEL criteria to stand-alone loops used to provide data telecommunications services. The Commission should defer consideration of the application of any use criteria to stand-alone loops until it has an adequate record. The current EEL requirements were extensively debated on the record and were the result in part of extensive negotiations between ILECs and CLECs. CTC is very concerned that the Commission may inadvertently harm data services or permit gaming by ILECs if it acts in the current quickly moving proceeding to fashion "architectural" safeguards for application to stand-alone loops. Given the total lack of evidence of use by IXCs of stand-alone UNE loops to bypass special access, and the reduced potential that they could use stand-alone loops to do so in contrast to EELs, the Commission should first seek comment on any such safeguards.

Sincerely,



Eric J. Branfman

Attorney for CTC Network, Inc.

cc: Honorable Michael K. Powell  
Honorable Kathleen Q. Abernathy  
Honorable Michael J. Copps  
Honorable Kevin J. Martin  
Honorable Jonathan S. Adelstein  
Christopher Libertelli  
Matthew Brill  
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Marlene H. Dortch, Secretary

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